BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Wireless Local Termination Tariff Applicable to Commercial Mobile Radio Service Providers that Do Not Have Interconnection Agreements with CenturyTel of Minnesota

ISSUE DATE: July 12, 2004

DOCKET NO. P-551/M-03-811

ORDER AFFIRMING PRIOR ORDER AND INVITING REVISED FILING

PROCEDURAL HISTORY

On November 18, 2003, the Commission issued its ORDER REQUIRING REVISED FILING. In that Order, the Commission found that it had the authority to approve a telephone company's tariff that charges a commercial mobile radio service provider (CMRS provider) cost-based rates for terminating local calls to CenturyTel's network. But the Commission rejected the specific tariff offered by CenturyTel of Minnesota, Inc., CenturyTel of Chester, Inc., and CenturyTel of Northwest Wisconsin, LLC (collectively, CenturyTel), and directed CenturyTel to submit a revised tariff that contained the following features:

- cost-based rates;
- a rate that is not otherwise discriminatory;
- a statement that the tariff does not eliminate reciprocity for termination rates;
- a provision for offsetting the amount of traffic that a wireless carrier terminates on CenturyTel's network by the amount of traffic that CenturyTel terminates to the wireless carrier's network, if technically feasible;
- language clarifying that the tariff does not apply when an interconnection agreement exists between the parties, such as "This tariff applies unless a Commission-approved interconnection agreement exists between the CMRS provider and the Telephone Company";
- language to the effect that termination of service shall not occur without prior Commission approval; and
- deletion of Section F (Land to Mobile Transmitting).

On December, 8, 2003, the Commission received a petition for reconsideration collectively from AT&T Wireless Services, Inc.; Midwest Wireless Communications, L.L.C.; NPCR, Inc., d/b/a Nextel Partners; Rural Cellular Corp.; T-Mobile USA, Inc.; and WWC Holding Co., Inc., d/b/a Western Wireless (collectively, the Wireless Consortium).

On December 18, 2003, the Commission received replies from CenturyTel and the Minnesota Department of Commerce (the Department) opposing the petition.

On January 14, 2004, the Wireless Consortium filed a copy of a court decision, *Wisconsin Bell v. Bie*,[1] with the Commission. On January 23, 2004, CenturyTel filed comments disputing the relevance of the decision to the current docket; Wireless Consortium responded with comments defending the case's relevance on January 28, 2004.

On February 5, 2004, the Commission met to consider this matter. The following day the Commission issued a notice soliciting briefings from the parties.

On March 8, 2004, the parties filed briefs. By March 23, 2004, the parties filed their reply briefs.

The Commission met on May 6, 2004 to consider this matter.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

As noted in the November 13, 2003 Order, local service providers typically charge other telecommunications service providers a fee to transmit and complete ("terminate") calls originating on the other providers' networks. These fees are set forth in the local providers' tariffs.

To open the local telecommunications market to competition, Congress adopted the Telecommunication Act of 1996 (1996 Act).[2] The 1996 Act requires all telecommunications carriers to interconnect their networks to permit the customers of one carrier to call the customers of another carrier.[3] But the 1996 Act and its accompanying regulations impose certain additional duties on incumbent local exchange carriers (called LECs or ILECs), including the duty to –

- permit competitive carriers to interconnect with their networks on just, reasonable and nondiscriminatory terms,[4]
- establish reciprocal compensation arrangements for the use of one carrier's network to transmit and complete calls from another carrier's customers,[5]
- negotiate in good faith the terms of this interconnection and reciprocal compensation,[6] including submitting to binding arbitration where necessary,[7] and

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[1] 340 F.3d 441 (7th Cir. 2003), *cert. denied* 124 S.Ct. 1051, 1075 (U.S. January 12, 2004) (*Bie*).

[2] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[3] 47 U.S.C. § 251(a)(1).

[4] 47 U.S.C. § 251(c).

[5] 47 U.S.C. § 251(b)(5).

[6] 47 U.S.C. § 251(c)(1).

[7] 47 U.S.C. § 252(b).

- permit a competitor to begin using their networks immediately upon the competitor's request to enter into an agreement for such use.[8]

A reciprocal compensation arrangement sets forth the terms by which a carrier agrees to complete calls to its subscribers that originate within the same local calling area but on another carrier's network, and vice versa. Compensation may be based on the amount of traffic that each carrier terminates to the other carrier's network. Alternatively, the carriers may agree to a "bill-and-keep" arrangement whereby each carrier agrees to waive its right to bill the other for the use of the other carrier's network. Reciprocal compensation arrangements may displace traditional tariff arrangements.

As a practical matter, the act of physically connecting networks can provide the opportunity for telecommunications service providers to establish mutual compensation mechanisms with each other. But smaller telephone companies may not connect directly to neighboring companies. Rather, a smaller company may arrange with a larger company to provide such connections.[9] In Minnesota, Qwest Corporation (Qwest) provides this service for CenturyTel; local service providers that need to connect with CenturyTel establish a physical connection with Qwest. Consequently, while CenturyTel has the same right to mutual compensation as any other provider, it does not have the same triggering mechanism for arranging such compensation that larger carriers enjoy, nor a practical method for excluding calls from carriers with whom it has no agreement. CenturyTel states without contradiction that it has pursued carriers for the better part of 18 months without obtaining an agreement.

Wireless carriers are not subject to all the obligations of an incumbent carrier.[10] Only when a wireless carrier requests interconnection and reciprocal compensation does the 1996 Act require the carrier to negotiate in good faith.[11] The Commission has approved hundreds of agreements between wireless carriers and incumbent carriers, derived through negotiation, arbitration, and the adoption of terms approved in prior agreements. But not all telecommunications traffic arrives pursuant to agreement. According to the Wireless Consortium, many wireless carriers maintain "*de facto* bill and keep arrangements,"[12] whereby a carrier terminates calls on another carrier's network without any agreement in place.

The current docket arises from CenturyTel's efforts to establish terms for the termination of calls originating on the networks of wireless carriers with whom CenturyTel does not have an interconnection agreement.

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[8] 47 C.F.R. § 715(a).

[9] Department brief (March 8, 2003) at 7, n.12; *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 66 Fed. Reg. 28,410 at ¶ 91, n.148 (April 27, 2001).

[10] 47 U.S.C. § 153(26) (The term "local exchange carrier" does not include providers of "commercial mobile service," thereby exempting wireless carriers from LEC obligations).

[11] 47 C.F.R. § 715(a).

[12] Wireless Consortium comments at 3.

II. PARTY POSITIONS

A. Wireless Consortium

The Wireless Consortium asks the Commission to reconsider its conclusion that it has jurisdiction to approve a tariff charging wireless carriers for terminating calls to CenturyTel's network without an interconnection agreement. The Consortium argues that federal law preempts the Commission's authority in this matter.

In the 1980s the Federal Communications Commission (FCC) issued a series of orders, dubbed the *Radio Common Carrier* orders, ruling that incumbents should not file tariffs imposing charges on a cellular carrier until after the carriers had negotiated an interconnection agreement.[13] According to the Consortium, the FCC made these rulings to prohibit carriers from setting intercarrier compensation rates unilaterally.

As a substitute for using a tariff to establish termination rates, the Wireless Consortium recommends that CenturyTel use the 1996 Act's negotiation and arbitration mechanisms. The Consortium notes that the Commission approved two cases in which telephone companies, relying on § 252(b)(1) and Minnesota rules, initiated negotiations and arbitration with wireless companies.[14]

Whether or not the Act's mechanisms for enforcing the duty to negotiate and arbitrate terms apply to wireless carriers, the Wireless Consortium argues that comparable duties and enforcement mechanisms can be found elsewhere in the law.

Specifically, the Wireless Consortium notes that in 1994 the FCC adopted Rule 20.11 directing wireless and wireline carriers to pay mutual reasonable compensation for terminating calls on each others' networks.[15] The Consortium cites the *AirTouch Cellular* case[16] as evidence that the FCC applied this rule specifically to intrastate calling as recently as 2001. In support of this duty

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[13] *Second Radio Common Carrier Order*, 2 FCC Rcd. 2910, ¶ 56 (released May 18, 1987); *Third Radio Common Carrier Order*, 4 FCC Rcd. 2369, ¶¶ 13-14 (released March 15, 1989).

[14] *In the Matter of the Request for Arbitration of Interconnection Agreements by Mankato Citizens Telephone Company, et al., with Qwest Wireless LLC, et al. Pursuant to Minn. Rules pt. 7811.1700*, Docket No. P-6250, 5508, 414, 416, 5107/IC-03-1448 ORDER GRANTING ARBITRATION AND ASSIGNING ARBITRATOR (October 6, 2003) at 2; *In the Matter of the Request for Arbitration of Interconnection Agreements by Certain Minnesota Independent Telephone Companies with Qwest Wireless LLC and TW Wireless LLC Pursuant to Minn. Rules pt. 7811.1700*, Docket No. P-401, et al./IC-03-1893 ORDER DENYING MOTION TO DISMISS, GRANTING ARBITRATION AND ASSIGNING ARBITRATOR (December 22, 2003).

[15] 47 C.F.R. § 20.11.

[16] *In the Matter of AirTouch Cellular*, FCC 01-194 Memorandum and Order, 16 FCC Rcd. 13502 (released July 6, 2001) (*AirTouch Cellular*).

created by Rule 20.11, the Wireless Consortium argues that 47 U.S.C. §§ 207 and 208 provide an enforcement mechanism. These statutes provide for parties aggrieved by an alleged violation of federal telecommunications law to sue in federal court for damages or complain to the FCC. The Wireless Consortium argues that the existence of Rule 20.11 and §§ 207 and 208 preempts state authority.

In support of its arguments, the Wireless Consortium cites various cases rejecting or qualifying the use of state tariffs or rules for intercarrier compensation.[17] The Consortium distinguishes cases cited by the Department as inapplicable to the facts of the current case. The fact that CenturyTel's tariff would cease to apply to any carrier that asked to negotiate an interconnection agreement does not save the tariff from preemption, the Wireless Consortium argues, because the law bars the Commission from approving terms for interconnection via any mechanism other than the 1996 Act.

In the event that the Commission does not reject the tariff, the Wireless Consortium asks the Commission to clarify the tariff's scope. Specifically, the Wireless Consortium asks whether the tariff would apply to a) calls that originate or terminate outside Minnesota, b) calls that originate and terminate in Minnesota, but are routed through a switch that is outside Minnesota, and c) calls that originate and terminate in Minnesota placed by a wireless customer roaming from another state.

B. CenturyTel

CenturyTel asks the Commission to deny the Wireless Consortium's petition to reconsider the November 18, 2003 Order, and to approve the tariff CenturyTel will file in compliance with that Order. As an initial matter, CenturyTel disputes the Wireless Consortium's claim that federal law preempts the Commission's authority over this matter. CenturyTel argues that the Act expressly preserves state authority to fashion remedies that do not conflict with federal law.[18] Moreover, CenturyTel argues that the Commission's Order does not conflict with federal law.

Specifically, CenturyTel disputes the claim that the Commission's Order or the resulting tariff could conflict with FCC Rule 20.11. As noted above, this rule directs wireless and landline carriers to compensate each other mutually for terminating traffic on each other's networks. The proposed tariff cannot conflict with this rule, CenturyTel reasons, because the Order declares that "nothing in the tariff precludes a wireless carrier from charging CenturyTel the same rates that

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[17] See, for example, *In the Matter of Bell Atlantic-Delaware, Inc. et al. v. Global NAPs, Inc.*, FCC 99-381, Memorandum and Order, 15 FCC Rcd. 12,946 (released December 2, 1999) (*Global NAPs I*); *In the Matter of Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, FCC 02-127, Order on Reconsideration, 17 FCC Rcd. 7902 (released April 26, 2002) (*Global NAPs II*); *In the Matter of Petition of WorldCom Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 02-218, Memorandum Opinion and Order, 17 FCC Rcd. 27,039 (released July 17, 2002); *Verizon North v. Strand*, 309 F.3d 935 (6th Cir. 2002); *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services*, 323 F.3d 348 (6th Cir. 2003) (*Michigan Bell v. MCIMetro*); *Bie*; *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003) (*Pac-West*); *US West Communications v. Sprint*, 275 F.3d 1241 (10th Cir. 2002) (*US West v. Sprint*).

[18] 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c).

CenturyTel charges the wireless carrier."[19] Nor could the tariff conflict with the rule's enforcement mechanism, CenturyTel reasons, because the rule does not specify an enforcement mechanism.

Rather than conflicting with the rule, the Order is consistent with and supportive of the rule's purpose of promoting mutual compensation, CenturyTel argues. While the Order does not set the rate that CenturyTel must pay to terminate traffic on a wireless carrier's system, CenturyTel acknowledges, the Order does the next best thing: it directs CenturyTel to offset the amount that it bills a wireless carrier for terminating traffic to CenturyTel's network by the amount of traffic that CenturyTel terminates to the wireless carrier's network. In this manner, according to CenturyTel, the tariff would have the effect of compensating a wireless carrier at the same rate that CenturyTel bills the carrier.[20] Therefore, CenturyTel argues, the Wireless Consortium's mutual compensation concerns are groundless.

CenturyTel further disputes the claim that the tariff would conflict with interconnection agreements. CenturyTel notes that the tariff must defer to an interconnection agreement, precluding any possibility of conflict.[21]

Also, CenturyTel disputes the Wireless Consortium's claim that §§ 207 and 208 provide the sole means by which CenturyTel may seek redress for violations of Rule 20.11. Noting that the Wireless Consortium does not cite cases explicitly supporting this proposition, CenturyTel cites cases purporting to demonstrate the opposite conclusion,[22] and distinguishes cases that appear to preclude the use of tariffs.[23]

The Wireless Consortium cites examples of Commission-approved negotiations and arbitrations between landline and wireless carriers as evidence that CenturyTel needs no additional mechanisms to induce wireless carriers to negotiate and arbitrate. In response, CenturyTel reviews the Order's legal arguments demonstrating that the 1996 Act does not provide a mechanism for compelling this result. As the November 18, 2003 Order observed, a carrier that agrees to engage in negotiations is legally bound to negotiate in good faith;[24] but no party has identified any

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[19] November 18, 2003 Order, this docket, at 8.

[20] *Id.*

[21] *Id.*

[22] See, for example, *Sprint Spectrum, et al. v. Missouri Public Service Comm'n, et al.*, 112 S.W.3d 20, 25 (Mo. App. W.D. 2003), rehearing and/or transfer denied (July 1, 2003), transfer denied (August 26, 2003) (*Sprint Spectrum*); *Michigan Bell v. MCIMetro*; *Bell South Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F.Supp.2d 946 (E.D. Ky. 2003) (*Cinergy*).

[23] *Radio Common Carrier* orders; *Global NAPs*; *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002); *Bie*; *Pac-West.*

[24] 47 C.F.R. § 715(a).

provision of law requiring an unresponsive carrier to do so. The fact that some carriers are willing to engage in negotiations and arbitrations does not mean that all wireless carriers will do so.[25]

Regarding the Wireless Consortium's request for clarification, CenturyTel does not oppose clarifying that its tariff would apply exclusively to intrastate calls – that is, to calls that both originate and terminate in Minnesota. According to CenturyTel, the tariff's application would not depend upon whether a call was routed through an out-of-state switch or whether a caller had a primary residence in another state.

C. The Department

The Department opposes the petition for reconsideration.

While the Wireless Consortium alleges that the Commission's decision is preempted by federal law, the Department finds inconsistency in the types of preemption the Consortium alleges. The Department notes that federal courts recognize three types of preemption: 1) "express preemption," wherein Congress states that authority over a given subject is given to federal authorities to the exclusion of states, 2) "field preemption," wherein state policies are implicitly displaced when Congress enacts a comprehensive statutory scheme that "fully occupies the regulatory field," and 3) "conflict preemption," wherein federal and state policies are deemed mutually exclusive because compliance with both would be physically impossible.

The Department argues that neither express preemption nor field preemption could apply in the current circumstances. Far from excluding state regulation expressly, or even impliedly, Congress denies any intent to displace state regulation of intrastate telecommunications except where actual conflicts arise.[26] Courts and the FCC have supported this interpretation, permitting the use of tariffs and other state policies to establish interconnection terms so long as they do not conflict with the Act.[27]

Consequently, the Department concludes that the only preemption that could apply to the Commission's Order is conflict preemption. And the Department argues that the Wireless Consortium fails to bear its burden of demonstrating where federal law expressly provides for displacing the type of tariff contemplated in this docket. The Department reports that no party has identified an FCC or federal court decision that directly addresses the circumstances of a wireless carrier terminating calls indirectly on a LEC's network without negotiating compensation,

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[25] November 18, 2003 Order, this docket, at 6.

[26] 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c); 1996 Act at § 601 (see 47 U.S.C. § 152 note).

[27] See, for example, *Michigan Bell v. MCIMetro*; *Cinergy*; *In the Matter of Public Utilities Commission of Texas*,13 FCC Rcd. 3460, ¶¶ 132-39 (1997) (*Texas* order); *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252 (e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Virginia Cellular, Inc. and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd. 27039 (released July 17, 2002).

although the FCC has been investigating this specific question for the past two years.[28] But the Department cites various cases in Minnesota and other states in which a CenturyTel-type tariff was approved.

While the Wireless Consortium cites two FCC decisions from the 1980s for the proposition that "tariffs should not be filed before co-carriers have conducted good faith negotiations on an interconnection agreement," the Department argues that changing circumstances have rendered these decisions inapplicable to the current case. These decisions arose in an environment where wireless carriers had little power to induce wireline companies to interconnect, negotiate reasonable rates, or pay for terminating calls on the wireless network. Since that time, the telecommunications industry has become subject to the 1993 Budget Act[29] and resulting regulation (including 47 C.F.R. § 20.11, directing parties to pay mutual and reasonable compensation for termination), and the 1996 Act and its resulting regulations. Today wireless carriers have the legal right and effective mechanisms to demand interconnection, good-faith bargaining and arbitration, and compensation.

But the 1996 Act does not offer comparable means for wireline carriers to induce wireless carriers to negotiate, the Department argues. Thus the tables have turned; whereas wireline carriers used to exercise unilateral power over wireless carriers, the Department asserts that today wireless carriers unilaterally impose *de facto* bill-and-keep terms on wireline carriers. Consequently, the Department concludes that the policies that motivated the FCC's orders from the 1980s do not apply to the CenturyTel tariff.

While the Wireless Consortium identifies a number of cases ruling that federal law preempted a state tariff establishing interconnection terms, there are also cases affirming that state tariffs do not necessarily conflict with federal law. And the FCC has not declared state tariffs to be preempted generally but instead has ruled on tariffs individually, upholding some and rejecting others based on whether their terms conflicted with federal law. In the absence of a relevant law preempting the Commission's decision, the Department argues that the Commission was within its authority to adopt its November 18, 2003 Order.

Finally, in response to the Wireless Consortium's request for clarification, the Department agrees that CenturyTel's proposed tariff would apply only to intrastate calls.

III. COMMISSION ACTION

A. Commission Authority to Approve Tariff

1. Introduction

The Commission has ruled that state law gives it the authority to approve a tariff governing the price that a telephone company may charge for the privilege of using the company's network to

[28] CC Docket No. 01-92, DA 02-2436 "Comments Sought on Petition for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic" (September 20, 2002).

[29] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A) and (B), 107 Stat. 312, 392 (1993).

terminate calls, absent some contrary interconnection term.[30] The Wireless Consortium requests reconsideration on the theory that the Commission's authority to approve CenturyTel's tariff is preempted by federal law. In support of this view, the Consortium cites one FCC rule and various federal statutes, court decisions and FCC orders. The Commission will consider each of these authorities in turn.

Preemption arises because the U.S. Constitution states that federal law is the supreme law of the land, "the Constitution or Laws of any State to the Contrary notwithstanding."[31] As the Supreme Court notes, courts recognize preemption by express provision, by implication, or by a conflict between federal and state law.[32] That is, Congress can define explicitly the extent to which its enactments preempt state law.[33] Also, in the absence of explicit statutory language, state law is preempted where there is a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[34] Finally, state law is preempted to the extent that it actually conflicts with federal law.[35] But the Supreme Court emphasizes that preemption is the exception, not the rule.

> [D]espite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* [*v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)]. See, e.g., *Cipollone v. Liggett Group, Inc*., 505 U.S. ___, ___ (1992) (slip op., at 10-11); id., at ___ (slip op., at 3) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926).[36]

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[30] November 18, 2003 Order, this docket, at 6.

[31] U.S. Constitution., article VI, clause 2.

[32] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

[33] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

[34] *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

[35] *English v. General Electric Co*., 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

[36] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

2. Rule 20.11 and Statutes §§ 207 and 208

In support of its preemption argument, the Wireless Consortium first cites FCC Rule 20.11(b). This rule says:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.
>
> (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

The Consortium notes that this rule may be enforced by complaining to the FCC or by suing in federal court pursuant to federal statutes §§ 207 and 208.

The Consortium reasons that this rule, combined with the enforcing statutes, preempts the Commission's authority to approve CenturyTel's tariff. First, the Consortium argues that Rule 20.11(b) requires mutual compensation based on a federal standard, subject to federal remedy. Second, the Consortium argues that the existence of both state and federal remedies creates a "physical impossibility" because "[t]here cannot be two compensation standards and two remedies for the same wrong." Third, the Consortium argues that the FCC has "occupied the field" of intercarrier compensation involving wireless carriers, fulfilling Congress's goal of bringing all mobile service providers under a comprehensive, consistent regulatory framework as discussed in the *AirTouch Cellular* order.

The Commission finds no preemption. The Commission finds no language expressly displacing state authority. Nor does the Commission find any "physical impossibility" in federal and state authorities exercising concurrent jurisdiction over the matter of reciprocal compensation. Certainly nothing in the cited rule or statutes mandates exclusively federal remedies. Nor is the Commission persuaded that Congress' regulatory scheme demonstrates an intent to displace state jurisdiction.

Indeed, the FCC has reached the opposite conclusion. While the 1993 Budget Act – the basis for Rule 20.11(b) – states that "no State or local government shall have any authority to regulate the entry of or the rates charge by any commercial mobile service," in its *Local Competition Order* the FCC concluded that states have authority to set the reciprocal compensation arrangements between wireless and wireline carriers.[37] Warning that some state policies, including tariffs, could run afoul of the 1993 Budget Act or the 1996 Act, the FCC nevertheless declined to issue a blanket preemption of these policies and instead concluded that such policies "would require a case-by-case evaluation."[38] Such case-by-case evaluation would be superfluous if all state jurisdiction were preempted.

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[37] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Report and Order, 11 FCC Rcd. 15499 (1996) (*Local Competition Order*), ¶¶ 1111-1118.

[38] *Id.* at ¶ 1026.

Similarly, in *AirTouch Cellular* the FCC said:

> We note that the *CMRS Second Report and Order* does state that *the [FCC] "will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time.*" This must be read in conjunction with the *nonrestrictive mutual compensation language* in that order. Accordingly, we conclude that the Commission's intent was to mandate mutual compensation for the termination of traffic that originates on the LEC's network, but to *not preempt state regulation of the actual rate paid by CMRS carriers for intrastate interconnection*.[39]

Consequently, the Commission finds no basis in the Wireless Consortium's petition to conclude that Rule 20.11(b) and statutes §§ 207 and 208 preempt this Commission's authority to approve CenturyTel's tariff.

3. *Radio Common Carrier Orders*

Following its petition for reconsideration, the Wireless Consortium filed a brief citing two *Radio Common Carrier* orders from the 1980s that putatively bar approval of CenturyTel's tariff. The FCC ruled that "tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection."[40] The FCC later "reaffirm[ed] that tariffs should not be filed before co-carriers have conducted good-faith negotiations on an interconnection agreement"[41] and elaborated as follows:

> Our statement regarding "pre-tariff negotiation agreements" was intended to reflect our recognition that ... if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier's bargaining power will be diminished.... [U]nder our "pre-tariff negotiation agreement" policy, we would not expect the [Bell operating company] to file a tariff pertaining to an "unresolved issue."[42]

For reasons of law and policy, the Commission finds the tariff preclusion language of these orders inapplicable to the current case. As a matter of law, the Department correctly observes that much of telecommunications regulation has changed since the 1980s. In response, the Wireless Consortium cites the *AirTouch Cellular* order to demonstrate that these orders remain in effect even after passage of the 1996 Act, and that they apply to intrastate traffic. But the *AirTouch Cellular* order merely upheld the principle of mutual compensation, not tariff preclusion. Indeed, given the support for state regulation of rates paid by CMRS providers for intrastate interconnection expressed in the *Local Competition Order* and the *AirTouch Cellular* order, it would be hard to reconcile these orders with the tariff preclusion language from the 1980s.

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[39] *AirTouch Cellular* ¶ 14 (citation omitted) (emphasis added).

[40] *Second Radio Common Carrier Order* ¶ 56.

[41] *Third Radio Common Carrier Order* ¶¶ 13-14.

[42] *Id*.

Moreover, the rationale that motivated the FCC's tariff preclusion policy would not apply to CenturyTel's tariff. The FCC articulated its tariff preclusion policy out of concern that "if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier's bargaining power will be diminished...." This concern reflects a particular understanding of tariffs, and a particular understanding of a wireless carrier's bargaining position. Neither understanding is relevant to the current case.

The practice of posting prices through tariffs arose to guard against discriminatory pricing, and tariffs were designed to apply uniformly and resist manipulation by buyers.[43] It is not surprising, therefore, that the FCC in the 1980s would conclude that the existence of a tariff would be antithetical to negotiations. But CenturyTel's proposed tariff is designed to have precisely the opposite effect, being perfectly manipulable because it terminates upon a buyer's request to negotiate different terms. In effect, CenturyTel's tariff will not constitute a "tariff" within the meaning of the Radio Common Carrier orders. Consequently, the concerns that motivated the FCC's tariff preclusion policy will not apply to CenturyTel's tariff.

Finally, a wireless carrier's bargaining position has improved markedly since the days of the *Radio Common Carrier* orders. Today wireless companies have the power to demand immediate interconnection with incumbents,[44] and to compel negotiations with incumbents with recourse to compulsory arbitration.[45] Consequently, the blunt instrument of barring all pre-negotiation tariffs has been overtaken by the more precise and flexible regulatory tools of the 1996 Act.

Moreover, no party has articulated how a CenturyTel-type tariff could impair another party's bargaining position. As noted above, the tariff will not bind any party that chooses not to be bound. And if the FCC were concerned that the mere existence of a price would somehow distort the negotiation process, Congress overruled that concern when it made tariff-like prices widely available. The 1996 Act permits competitors to pick and choose terms from other existing interconnection agreements[46] or from a carrier's statement of generally available terms (SGAT),[47]

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[43] *AT&T v. Central Office Telephone,* 524 U.S. 214, 221-24, 118 S.Ct. 1956, 1962-64 (1998), *reh. denied* 524 U.S. 972, 119 S.Ct. 20 (1998).

[44] 47 C.F.R. § 715(a).

[45] 74 U.S.C. §§ 251, 252.

[46] 47 U.S.C. § 252(i).

[47] 47 U.S.C. § 252(f). The *Strand* court dismisses the relevance of SGATs as a means of obtaining interconnection without negotiation, arguing that SGATs are subject to the same scrutiny as interconnection agreements. 309 F.3d at 939. But, in fact, SGATs may take effect without any review whatsoever. 47 U.S.C. § 252(f)(3)(B). This is the practice in Minnesota. See *In the Matter of Qwest Corporation's Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket No. P-421/CI-01-1374 ORDER CLARIFYING NOTICE AND ORDER FOR HEARING OF SEPTEMBER 11, 2001 (November 13, 2001) at 3.

and to buy services at tariffed rates minus a wholesale discount.[48] Additionally, if a competitor does not care for the terms available from these sources or from negotiations, it always has the option of demanding that prices be set at their total element long-run incremental cost (TELRIC), via arbitration.

The Commission finds that the concerns that motivated the tariff preclusion language of the *Radio Common Carrier* orders do not apply to the CenturyTel's proposed tariff. Additionally, the FCC acknowledges the states' role in regulating intrastate interconnection rates applicable to wireless carriers, as declared in the *CMRS Second Report and Order* and reaffirmed in *AirTouch Cellular*. These facts lead the Commission to conclude that the *Radio Common Carrier* orders do not demonstrate preemption of the Commission's authority to approve a CenturyTel-type tariff.

4. Caselaw

In briefing its argument that Rule 20.11, statutes §§ 207 and 208, and the *Radio Common Carrier* orders preclude the Commission from approving CenturyTel's proposed tariff, the Wireless Consortium cites a number of cases. These cases raise distinct issues from the rest of the Consortium's argument and so will be addressed separately here.

a. Presumptive Intent

First, the Commission observes that the cited cases do not focus on Rule 20.11, statutes §§ 207 and 208, or the *Radio Common Carrier* orders. Rather, they are grounded in the 1996 Act, which was not the basis for the Wireless Consortium's petition for reconsideration. While the quoted language may appear to support the same conclusions that the Consortium advanced on the basis of these earlier authorities, the reasoning underlying the quotes is often unrelated to those authorities.

This is not a trivial distinction. As the U.S. Supreme Court emphasized, "[i]t will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of *intention* to do so."[49] The intent underlying different federal statutes may differ. Thus, while the Wireless Consortium urges the Commission to conclude that the CenturyTel tariff is preempted by §§ 207 and 208, and also by the 1996 Act, these arguments do not bolster each other; they must stand on their own merits.

Moreover, the 1996 Act contains explicit statements of Congressional intent regarding the preemption of state authority:

> **47 U.S.C. § 251(d)(3) Preservation of State access regulations.** In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that -

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[48] 47 U.S.C. §§ 251(c)(4), 252(d)(3).

[49] *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) (emphasis added).

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 261 Effect on other requirements.

(b) Existing State regulations. Nothing in this part shall be construed to prohibit any State commission from ... prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements. Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC]'s regulations to implement this part.

1996 Act § 601(c)(1).

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

The Conference Committee Report for the 1996 Act expounds on the purpose of the uncodified language at § 601(c)(1) as follows: "The conference agreement adopts the House provision stating that the bill does not have any effect on any other ... State or local law unless the bill expressly so provides. This provision *prevents affected parties from asserting that the bill impliedly preempts other laws.*"[50]

Congress has eliminated the need to conjecture about whether or not it intended to preempt state policy. To the extent the 1996 Act preempts, it does so explicitly. As summarized by one court:

> When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets ... however, Congress did not intend to permit state regulations that conflicted with the 1996 Act... Thus, a state may not impose any requirement that is contrary to terms of sections 251 though 261 or that 'stands as an obstacle to the

[50] H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 201 (1996), reprinted in 1996 U.S.C.C.A.N. 215 (emphasis added).

accomplishment and execution of the full objectives of Congress.'" According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.[51]

Or, as the Supreme Court noted when interpreting the 1996 Act, "it takes a stretch to get from permissive statutory silence to a statutory right" to be free from regulation.[52]

b. Cases with Similar Facts

Second, the Commission observes, as the Department observed, that none of the cases that the Consortium cites for support involves facts analogous to the facts of the current case: a small telephone company proposing to tariff terminating traffic from wireless carriers that have an indirect physical connection with the company and that have not agreed to negotiate an interconnection agreement.

Such cases do exist. As the Department notes, this Commission has addressed many such cases,[53] as have other commissions and even one court.[54] The Commission is aware of only one instance

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[51] *Cinergy*, 297 F.Supp.2d at 953 (internal citations omitted).

[52] *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1684, 152 L.Ed.2d 701 (2002) (Act does not require incumbents to combine unbundled network elements at competitor's request, but neither does it bar FCC rule requiring that result); see also *AT&T Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 394 (Act's silence does not bar state policy providing for incumbents to recombine elements).

[53] Docket No. P-429/AM-98-538 (Twin Valley-Ulen Telephone Company) (May 12, 1998); Docket No. P-504/AM-98-384 (Benton Cooperative Telephone Company) (May 15, 1998); Docket No. P-517/AM-98-678 (Dunnel Telephone Company) (May 20, 1998); Docket No. P-413/M-98-216 (Lakedale Telephone Company) (May 27, 1998); Docket No. P-51/M-98-968 (Delavan Telephone Company) (July 8, 1998); Docket No. P-502/M-98-1095 (Barnesville Municipal Telephone Company) (July 28, 1998); Docket No. P-414/AM-99-1332 (Mankato Citizens d/b/a HickoryTech) (September 21, 1999).

[54] *Sprint Spectrum*, affirming *In the Matter of Tariff Filing of CenturyTel of Missouri LLC to Introduce The Provisioning of IntraMTA Wireless Service*, Missouri PSC Case No. TT-2003-0446, Tariff No. JL-2003-1729, Order Lifting Tariff Suspension and Closing Case (April 29, 2003); *In re: Request for a Declaratory Ruling Upholding the Applicability of Tariff Provisions Governing Compensation for Indirect CMRS Traffic*, Alabama PSC Docket 28988, Declaratory Order at § V ("Findings and Conclusions") (January 4, 2004); *Notice and Filing of Tariff by CenturyTel of Northwest Arkansas, LLC*, Oklahoma Corp. Comm., Cause No. 200300337, Final Order Granting Tariff Approval (July 2003). But see *In the Matter of The Commission, On Its Own Motion, Seeking to Investigate Telecommunications Companies' Terms, Conditions and Rates for the Provision of Wireless Service*, Nebraska PSC App. No. C-2738/PI-58, Tariffs Denied in Part (January 22, 2003).

of a decision finding that the tariff was preempted.[55] The weight of relevant precedent, therefore, supports the Commission's authority to approve the tariff.

It is also noteworthy that both incumbent carriers and wireless providers have petitioned the FCC to clarify the rights and mechanisms for their mutual compensation regarding the fact pattern arising in this docket.[56] While the FCC has yet to rule on these petitions, the fact that the FCC solicited comments nationwide and has been considering the matter for nearly two years belies any suggestion that the issue has been authoritatively resolved one way or the other.[57]

c. Cases Argued By Extension

Nevertheless, the Wireless Consortium cites a number of cases preempting state interconnection policies. But these cases – including *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), *MCI Telecommunications Corp. v. GTE Telecommunications*, 41 F.Supp.2d 1157 (D.Or. 1999), and *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 797 N.E.2d 716 (Ill. App. Ct 2003) – generally involve a court preempting a state policy that compelled an incumbent against its will to offer Commission-imposed interconnection terms by tariff. In a variant on this theme, the court in *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), preempted a state's efforts to govern interstate traffic, but added that any state policy that conflicted with the terms of an interconnection agreement would be preempted anyway.

In contrast, CenturyTel and the Department cite a number of cases upholding state policies. These cases – including *Michigan Bell Tel. Co. v. MCImetro Access Transmission Services*, 323 F.3d 348 (6th Cir. 2003), *US West v. Sprint*, 275 F.3d 1241 (10th Cir. 2002), and *Bell South Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F.Supp.2d 946 (E.D. Ky. 2003) – generally ruled that a competitor may demand services from an incumbent at the terms set forth in

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[55] See *id*, Nebraska PSC case.

[56] CC Docket No. 01-92, DA 02-2436 "Comments Sought on Petition for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic" (September 20, 2002). The FCC summarizes the facts in the CMRS providers' petition as follows:

> [A] CMRS carrier typically will interconnect indirectly with a rural ILEC (i.e. traffic will be exchanged through an intermediate carrier.) CMRS Petitioners state that indirectly interconnecting carriers often exchange traffic pursuant to a bill-and-keep arrangement, rather than an interconnection agreement, at least for mobile-to-land traffic. CMRS Petitioners state that some rural LECs recently have filed state tariffs as a mechanism to collect reciprocal compensation for the termination of intra-[metropolitan calling area] traffic originated by CMRS carriers. The CMRS Petitioners assert that compensation for such traffic should be paid only when the LEC and the CMRS carrier have entered into an interconnection agreement....

Id.

[57] See also *Global NAPs I* at 12,958 ¶ 21 (FCC acknowledges that it had not yet ruled on the propriety of using tariffs to establish compensation for terminating traffic).

the incumbent's tariff, even if the competitor's interconnection agreement does not include the tariffed terms or even includes different terms for the services.[58] And in *In the Matter of Public Utilities Commission of Texas*, 13 FCC Rcd. 3460, ¶¶ 132-39 (1997), the FCC upheld a state policy requiring an incumbent to offer its services to competing carriers at five percent less than its tariffed prices. The incumbent did not object to the policy, and the FCC concluded that the policy did not bar any party from negotiating or arbitrating for different terms.

None of these cases involved the exchange of traffic between wireless and wireline carriers. None of these cases involved efforts to remedy one party terminating traffic to another without an interconnection agreement. None of these cases involved a tariff that would cease to have effect upon the beginning of intercarrier negotiations. And, with the possible exception of the *Texas* order, none of these cases involved an incumbent affirmatively requesting a tariff. Consequently, the Commission finds that these cases are simply inapplicable to the current facts.

5. Summary

In sum, the Commission finds that the grounds cited in the Wireless Carrier's petition for reconsideration – FCC Rule 20.11, statutes §§ 207 and 208, and the *Radio Common Carrier* orders – do not require preemption of the CenturyTel tariff. The Commission finds that the case law addressing fact patterns similar to the current case do not require preemption of the CenturyTel tariff. And the Commission finds that the other cases cited by the commentors are not applicable to the current facts. Lacking a basis to find that federal law preempts the Commission's authority to approve a CenturyTel-type tariff, the Commission will reaffirm its authority.

B. Commission Rationale for Decision

Having reaffirmed its authority to approve a CenturyTel-type tariff, the Commission now reaffirms its reasons for approving the proposed tariff.

In adopting the 1996 Act, Congress clearly envisioned carriers negotiating the terms of reciprocal compensation for terminating traffic to each other. It is less clear that Congress envisioned carriers terminating calls to each other without such negotiations. But envisioned or not, they do. Absent some means of stopping these calls from flowing, some unnegotiated compensation scheme must apply by default, at least until interconnection agreements can be negotiated. This case determines the selection of that default scheme. No matter what choice is made, the default scheme will not be the result of the 1996 Act's negotiation and arbitration procedures. Deprived of a viable means of implementing the Act's procedures, the Commission has selected the default compensation scheme that best upholds the Act's goals.

In cases where courts have had the choice of directing parties to pursue options that indisputably do conform to the 1996 Act's procedures, courts have been free to emphasize the importance of those procedures. Some have gone so far as to suggest that the 1996 Act provides

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[58] See also *In the Matter of the Petition by AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Communications Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442, 421/IC-03-759 ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT (November 18, 2003) at 6-7 (competitor may purchase tariffed services without incorporating them into interconnection agreement).

the only basis for establishing interconnection terms.[59] But even if this Commission were persuaded of the need to channel all intercarrier transactions through the 1996 Act's process, it is unclear how striking down CenturyTel's tariff – and leaving wireless carriers free to pursue *de facto* bill-and-keep – would promote this end.

It is no answer to suggest that, in lieu of its tariff, CenturyTel could pursue remedies pursuant to §§ 207 and 208. First, those remedies are not part of the 1996 Act, and therefore would not achieve the purpose of the preemption cited by the courts. Second, there is some dispute about the adequacy of these remedies.[60] But most importantly, to the extent that §§ 207 and 208 provide a remedy, that remedy is equally available to wireless carriers as to CenturyTel. If, as the Wireless Consortium argues, these statutes provide a means for CenturyTel to contest a wireless carrier's default compensation scheme, they provide a means for a wireless carrier to contest CenturyTel's compensation scheme as well. Consequently, whether or not the Commission upheld the tariff, some unnegotiated default compensation scheme will continue to apply, and the party that objects to that scheme will have recourse to pursue remedies pursuant to §§ 207 and 208.

Thus, in the choice between CenturyTel's tariff or *de facto* bill-and-keep, the existence of §§ 207 and 208 remedies is a matter of indifference. But other policy considerations clearly favor the tariff. Specifically, CenturyTel's tariff will offer a more rational price, and the tariff will provide better alternatives to parties that object to paying that price.

The price in CenturyTel's tariff must reflect its cost of termination – that is, it must reflect an estimate of the price that would result if the issue were submitted for arbitration pursuant to § 252(d)(2)(A). In contrast, *de facto* bill-and-keep reflects a mutual termination rate of $0. The option of selecting this compensation scheme is reserved to the states (or to the FCC acting in the role of the states),[61] not to any one party. Indeed, the FCC specifically rejected the idea that bill-and-keep should be the default basis for terminating wireless traffic:

> 1112. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination." In general, we find that carriers incur cost in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for

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[59] *Bie*, 340 F.3d at 445; *Strand* at 939-40; *Illinois Bell*, 797 N.E.2d at 723-24.

[60] Section 207 provides for a party claiming damages to "make complaint to the [FCC or] bring suit *for recovery of the damages* ... in any district court of the United States...." (Emphasis added.) The Department argues that this language limits remedies in district court to damages and not, say, injunction and compulsory arbitration. Department brief (March 8, 2003) at 8, n.14. The Wireless Consortium argues that the district court's authority is not so limited. Wireless Consortium reply brief (March 23, 2004) at 10, n.5.

While § 208 provides for the FCC to hear and resolve complaints within five months, in practice resolutions can take longer. See *AT&T Corp. v. F.C.C.*, 317 F.3d 227 (D.C. Cir. 2003) (finding four-and-a-half year delay in resolving terminating access dispute reasonable.) In contrast, the 1996 Act provides for resolving interconnection disputes within nine months.

[61] 47 C.F.R. §§ 51.705(a), 51.713(b).

> compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient.... [I]n certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements.
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> * * *
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> 1118. [W]e conclude that we are correct in not adopting bill and keep as a single, nationwide policy the would govern all LEC-CMRS transport and termination of traffic.[62]

Clearly, a price based on cost better reflects the 1996 Act's purposes than a price based on a default compensation scheme rejected by the FCC.

Moreover, given that any default compensation scheme will not be the result of negotiation and arbitration, the CenturyTel tariff provides the contesting party a better means to contest the default mechanism than the *de facto* bill-and-keep scheme provides. Under *de facto* bill-and-keep, if CenturyTel were dissatisfied it would be left to pursue remedies pursuant to §§ 207 and 208. Similarly, under CenturyTel's tariff, a dissatisfied wireless carrier could pursue §§ 207 and 208 remedies. But in addition, the wireless carrier would have the option of demanding that CenturyTel negotiate new termination terms pursuant to the 1996 Act. Consequently, if the goal is to encourage parties to pursue 1996 Act negotiations, the Commission finds that the existence of the CenturyTel tariff will tend to promote rather than impede that end.

In sum, the Commission does not have the option to choose whether or not wireless carriers will terminate traffic to CenturyTel's system without first negotiating terms. Given the need for some default compensation mechanism, there are strong policy considerations favoring CenturyTel's tariff over *de facto* bill-and-keep. The tariff's rate is more consistent with the policies underlying the 1996 Act, and a party seeking to avoid the tariff's application will have direct access to the 1996 Act's remedies.

C. Merits of Proposed Tariff

Having found both authority and cause to approve the proposed tariff generally, the Commission will now turn its attention to details of the tariff's provisions.

1. Effect of Interconnection Agreement

All parties agreed that CenturyTel's tariff should not apply to a wireless carrier where CenturyTel has an interconnection agreement with the carrier. Earlier the Department argued that the tariff's language should be made clearer on this point, and the Commission adopted this recommendation into its November 18, 2003 Order. But the Order's language left ambiguity about the application of the tariff during the period after CenturyTel has received a request to negotiate but before a new interconnection agreement has taken effect. To clarify its intent further the Commission will direct

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[62] *Local Competition Order*, ¶¶ 1112-1118; see also *In the Matter of Cost-Based Terminating Compensation for CMRS Providers*, FCC 03-215, Order (released September 3, 2003) at ¶ 2 (CMRS-LEC reciprocal compensation should recover incumbent's incremental costs).

CenturyTel to include, in any wireless local termination tariff, language substantially similar to the following:

> This tariff does not apply when an interconnection agreement already exists between a CMRS provider and CenturyTel. Further, this tariff ceases to apply as of the date CenturyTel receives a request from a CMRS provider for negotiation under 47 U.S.C. § 252(b)(1).

2. Intrastate vs. Interstate Tariff

The Wireless Consortium asks the Commission to clarify the types of calls that would be subject to the proposed tariff. CenturyTel and the Department state that the tariff would apply to intrastate calls – that is, calls originating and terminating within Minnesota. The path by which a call is routed would be irrelevant to this analysis.

CenturyTel and the Department correctly articulate the scope of intrastate tariffs. To the extent that this clarification is necessary, the Commission adopts their view.

3. Timing and Effect

The tariff resulting from this docket will be designed to represent, as far as possible, a voluntary resolution of issues. A wireless carrier will have the absolute and immediate discretion to launch negotiations with CenturyTel for an interconnection agreement to replace the tariff's provisions. But the voluntary nature of the tariff applies to CenturyTel as well. While CenturyTel must not file a tariff that is inconsistent with the Commission's Orders, it need not file any tariff at all. And if CenturyTel elects to file a tariff, CenturyTel may elect to withdraw it in the future. In this way, the proposed tariff will not bind any party that chooses not to be bound by its provisions, whether incumbent or wireless provider.

In the interest of administrative convenience, however, the Commission will direct CenturyTel to decide whether to file, and to implement its decision, within 30 days of this Order.

Having reviewed the terms of CenturyTel's initial tariff, the Commission finds that it is reasonable and warrants approval except as otherwise specified in this Order and the November 18, 2003 Order. Consequently, if CenturyTel files a tariff that conforms to the directions set forth therein within the 30 days, the tariff will be approved.

The Commission will so order.

ORDER

1. The Commission grants reconsideration of its ORDER REQUIRING REVISED FILING (November 18, 2003).

2. The Commission affirms its conclusion that it has authority to approve a local termination tariff applicable to commercial mobile radio service providers that do not have interconnection agreements with CenturyTel. Any requested relief not granted herein is hereby denied.

3. CenturyTel shall incorporate into any revised tariff filing language substantially similar to the following:

"This tariff does not apply when an interconnection agreement already exists between a CMRS provider and CenturyTel. Further, this tariff ceases to apply as of the date CenturyTel receives a request from a CMRS provider for negotiation under 47 U.S.C. § 252(b)(1)."

4. CenturyTel's tariff shall apply to telecommunications traffic that originates and terminates in Minnesota.

5. If CenturyTel chooses to file a tariff that conforms to the Commission's directions in this docket, it shall do so within 30 days of this Order.

6. A tariff that conforms to the requirements specified in this Order and the prior Order is hereby approved.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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